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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-614

HAPAG-LLOYD, A.G., as owner of the M/V BRANDENBURG, and as bailee of cargo laden thereon, and STORK AMSTERDAM N.V., *et al.*, as owners of certain cargoes laden thereon,

Petitioners,

—against—

TEXACO PANAMA, INC., as owner of the M/V TEXACO CARIBBEAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Constitutional Provisions, Treaties, Statutes, Ordinances, or Regulations Concerned 3

Statement of the Case 3

Facts 4

REASONS FOR GRANTING THE WRIT

POINT I—

This Court Should Settle a Vital Point of Federal Law: That It Is An Essential Requirement For Application of *Forum Non Conveniens* That There Be An Alternative Forum Providing Plaintiffs With An Effective Remedy 9

POINT II—

This Court Should Resolve the Conflict Between the Second and Sixth Circuits and Settle the Enlightened and Responsible Rule of Federal Law That the Owner of a Dangerous Sunken Wreck Has a Continuing Non-Delegable Obligation, Not Relieved by Ineffectual Efforts by Governmental Authorities, To Use Utmost Diligence To Locate and Mark His Wreck 15

PAGE

A. The present decision by the Court of Appeals for the Second Circuit directly conflicts with that of the Sixth Circuit in *Ingram Corporation* v. *Ohio River Company*, 505 F.2d 1364 (1974) 16

B. By Resolving the Conflict in favor of the Enlightened and Responsible Rule of the Sixth Circuit, this Court can establish an Enlightened Federal Policy to promote Safety of the Sea Lanes 19

CONCLUSION 22

APPENDIX:

Majority (Anderson, C.J.) and Dissenting (Oakes, C.J.) Opinions in The Second Circuit 1b

Separate Concurring Opinion (Mansfield, C.J.) in The Second Circuit 22b

Per Curiam Opinion Striking Error in Majority Opinion, But Deciding Against Rehearing in The Second Circuit 24b

Second Circuit's Order (Clerk) Denying Rehearing 24b-1

Second Circuit's Order (Kaufman, C.J.) Denying Rehearing In Banc 25b

Memorandum Endorsement by Southern District of New York (Metzner, U.S.D.J.) Adopting Magistrate's Report 26b

Magistrate's Report Recommending Dismissal of Petitioners' Complaints (Jacobs, U.S.M.) 28b

Index to Citations

Cases: PAGE

Apurimac, The, 7 F.2d 741 (E.D. Va. 1925) *aff'd* as *Heredia* v. *Davies,* 12 F.2d 500 (4th Cir. 1926) 11

Belgenland, The, 114 U.S. 355 (1885) 14
Berwind-White Coal Mining Co. v. *Pitney,* 187 F.2d 665 (2d Cir. 1951) 17, 19
Bowman v. *Loperena,* 311 U.S. 262 (1940) 2

Chemical Carriers v. *L. Smit & Co.'s Internationale S.,* 154 F.Supp. 886 (S.D.N.Y. 1957) 11

Douglas, The, [1882] 7 P.D. 151 ..... 15, 19

Flota Maritima Browning v. *The Ciudad de la Habana,* 181 F.Supp. 301 (D.Md. 1960) 12

General Motors Overseas Operation v. *S.S. Goettingen,* 225 F. Supp. 902 (S.D.N.Y. 1964) 11
Gkiafis v. *S.S. Yiosanas,* 387 F.2d 460 (4th Cir. 1967) 12
Gulf Oil v. *Gilbert,* 330 U.S. 501 (1947) 9, 10, 12

Ingram Corporation v. *Ohio River Co.,* 505 F.2d 1364 (6th Cir. 1974) 16, 17, 19

Madeleine Wheeldon v. *United States of America,* 184 F. Supp. 81 (N.D. Cal. 1960) 14
Marine Towing Inc. v. *Red Star Towing & Transportation Co.,* 1974 A.M.C. 691 (E.D.N.Y. 1973) 20
Morania Barge No. 140, Inc. v. *M. & J. Tracy, Inc.,* 312 F.2d 78 (2 Cir. 1962) 19

New York Marine Co. v. *Mulligan,* 31 F.2d 552 (2 Cir. 1927) 19

PAGE

Plymouth, The, 225 F. 483 (2 Cir. 1915) 19

Royal M.S.P. Co. v. *Companhia de Navegacao Lloyd Brasileiro*, 27 F.2d 1002 (E.D.N.Y. 1928) 12

Tivoli Realty v. *Paramount Pictures*, 89 F.Supp. 278 (Del. 1950), *mand. denied* 186 F.2d 111, *cert. den.* 340 U.S. 953, *appeal dismissed* 186 F.2d 120 11

Utopia, The [1893] A.C. 492 15

Varvvorsos v. *Pezas*, 41 F.Supp. 318 (S.D.N.Y. 1941) 12

William Nelson, The, 296 F. 553 (E.D.N.Y. 1923) 14

Statutes:

28 U.S.C. § 1254(1) (Jurisdiction and Venue; U.S. Sup. Ct.) 2

28 U.S.C. § 1331(1) (District Courts; Jurisdiction) 4

28 U.S.C. § 2101(c) (Review, U.S. Sup. Ct.) 2

Court Rules:

Federal Rules of Civil Procedure, Rule 9(h) 3

Supreme Court Rule 21 (Record Certification and Transmittal) 4

Supreme Court Rule 22.3 (filing Petition for Writ) 2

Texts:

A. M. Bickel, *Forum Non Conveniens in Admiralty*, 35 Cornell Law Quarterly 12 (1949) 10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The Southern District of New York's March 26, 1974, Memorandum Endorsement adopted Magistrate M.D. Jacobs' prior Report recommending dismissal of Petitioner's complaints without substantive discussion; neither the Endorsement nor the Report are yet reported. Both are reproduced in the Appendix.

The Second Circuit's majority opinion (Anderson, *C.J.*) dismissing Petitioners' appeal below, and minority opinion

(Oakes, *C.J.*) suggesting that ". . . some of the cobwebs that fill the attic of admiralty law * * * need cleaning out", were handed down June 25, 1975; a concurring opinion (Mansfield, *C.J.*) was filed on July 8, 1975; a *per curiam* opinion modifying the majority opinion of the Court by removing from it one of the erroneous portions pointed out by Petitioners, but deciding against Petitioners' application for rehearing, was made effective by the Second Circuit's final order denying rehearing in banc on August 6, 1975. None are yet reported. All are reproduced in the Appendix.

Jurisdiction

28 U.S.C. §1254(1) states that civil cases in the Federal Courts of Appeal may be reviewed in this Court by writ of *certiorari* upon the petition of any party.

Under Supreme Court Rule 22.3 and 28 U.S.C. §2101(c), application for a writ of *certiorari* to bring a civil judgment or decree here for review shall be made within ninety days after the entry of such judgment or decree. In a case where a petition for rehearing is rejected, this ninety day period begins to run from the date of the order denying the petition. *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940).

The Second Circuit's Majority Opinion, which Petitioners ask be reviewed, was entered June 25, 1975. Petitioners' timely application below for rehearing in banc was denied by the Second Circuit's order of August 6, 1975. This petition for *certiorari* was filed on October 23, 1975, prior to expiration of the applicable ninety day deadline on November 4, 1975.

This Court's jurisdiction is accordingly invoked under 28 U.S.C. §1254(1).

Questions Presented

This Petition requests that this Court settle two very important questions of federal law on which this Court has not previously ruled. One of them involves a conflict between the law of the Second and Sixth Circuits.

1. Do factors of "convenience" ever justify extinguishing plaintiffs' cause of action by transferring plaintiffs to another forum in which plaintiffs have no remedy?

2. Should not a shipowner's duty to use utmost diligence to locate and mark his dangerous sunken wreck in order to safeguard navigation continue despite ineffectual efforts by governmental authority?

(On this important issue, there is a direct conflict between the Second and Sixth Circuits).

Constitutional Provisions, Treaties, Statutes, Ordinances, or Regulations Concerned

None are involved.

Statement of the Case

This litigation arises out of 14 consolidated suits brought to recover for the heavy loss of life, and total loss of ship and cargo, suffered when the Brandenburg struck the unlocated, unmarked sunken wreck of Texaco Caribbean's stern section in international waters in the Dover Straits at 0730 a.m. January 12, 1971, and sank within minutes afterwards. Petitioners' claims are accordingly of an admiralty or maritime nature within the meaning of FRCP Rule 9(h), so that the basis for federal jurisdiction in the

Court of first instance (the Southern District of New York) was 28 U.S.C. 1333(1).

Petitioners on this application are Hapag-Lloyd, A.G., owner of the M/V Brandenburg, and Stork Amsterdam N.V., *et al.*, owners of certain cargoes aboard her. We are informed and authorized to state that the Administrator of the estates of twelve deceased crewmembers will also file a petition for *certiorari* within the time prescribed by law.

Facts

The facts pertinent to this petition are:

1. Respondent Texaco's motor vessel Texaco Caribbean collided with the M/V Paracas in international waters in the Dover Straits, the world's busiest waterway, at about 0400, January 11, 1971. Shortly thereafter the Texaco Caribbean broke in two.[1]

2. The bow portion of the Texaco Caribbean sank promptly; however, her stern section remained afloat for approximately ten hours following the collision,[2] during which time several eye-witnesses observed that it would have been a simple matter to have attached a buoy or other floating marker, so that the slowly sinking stern section would have been marked after it submerged.[3]

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[1] 77a. To facilitate reference to the Record if desired, Petitioners have requested (pursuant to Supreme Court Rule 21) that the Clerk of the Second Circuit Court of Appeals certify and transmit to this Court the printed Record already filed there, together with the proceedings below. Page numbers in the separate printed Record below, and citations thereto, are followed by the letter "a". Page numbers in the Appendix attached to this Petition, and citations thereto, are followed by the letter "b".

[2] 77a.

[3] 282a-283a.

3. Texaco was notified almost immediately of the casualty, whereupon it advised British governmental authority (Trinity House, roughly equivalent to the United States Coast Guard) of its wrecked Texaco Caribbean.[4] This notification of Trinity House was given while the stern section of the wreck was still afloat.[5]

4. In response thereto, Trinity House dispatched its ship Siren. The Siren (which *never* located the wrecked Texaco Caribbean)[6] departed at 7:52 a.m., January 11, 1971[7]—a few hours after the collision, more than six hours before the stern section sank, *and almost 24 hours before the Brandenburg struck the sunken wreck and sank at 7:30 a.m., January 12, 1971.*

5. At 10:30 a.m., January 11, 1971,[8] the international salvage firm of Smit-Tak/Rotterdam offered to Texaco the services of its sophisticated wreck-locating and salvage vessel Orca.[9] Texaco declined to retain her services.[10]

6. At approximately 2:08 p.m., January 11, 1971, the unlocated, unbuoyed stern of the Texaco Caribbean sank beneath the surface.[11]

7. Later that afternoon Smit-Tak renewed its inquiries of Texaco, but still received no instructions.[12]

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[4] 77a.

[5] 3b.

[6] 283a.

[7] 77a.

[8] 336a.

[9] 283a.

[10] 282a.

[11] 77a.

[12] 272a.

8. The Trinity House vessel Siren began to search for the wrecked Texaco Caribbean at about 4:30 p.m., January 11, 1971 in the Dover Straits. Lacking any real idea of where the two wreck sections of the Texaco Caribbean had sunk, the Siren showed three vertical green lights and "mistakenly moored at the edge of an oil slick" [13] which she assumed indicated the location of one or the other sunken sections of the Texaco Caribbean. In fact, the wrecked section "was actually located about a mile from the Siren's anchored position." [14]

9. At 7:30 a.m. on January 12, 1971,[15] almost 24 hours after Trinity House undertook its unsuccessful efforts, the Brandenburg ran upon the unmarked, unlocated wrecked stern section of the Texaco Caribbean and sank within minutes with heavy loss of life, and total loss of ship and cargo.

10. No whistles or radio signals, nor any rescue efforts, were made by the "pathetic" [16] Siren, which remained unaware of the collision until approximately 10 o'clock that morning.[17]

11. Petitioner Hapag-Lloyd immediately dispatched the Smit vessel Orca to locate the wrecks. *The Orca located all three submerged wrecks precisely, by sonar, within half an hour of her arrival.*[18] Smit personnel state that, if the Orca had been employed by Texaco when repeatedly offered on Jan. 11th, the Orca could have reached the collision

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[13] Majority Opinion, 3b.

[14] *Id.*

[15] 272a.

[16] 15b.

[17] 273a.

[18] 283a.

area in plenty of time *to locate and mark* all the wrecks before the Brandenburg reached the area; in the event, the Siren remained unable to locate the Texaco Caribbean's sunken remains until the Orca arrived—after the Brandenburg's loss.[19]

Representatives of twelve of the deceased crew members of the Brandenburg brought suit against Texaco in the Southern District of New York at various times from November 27, 1972 through January 9, 1973. Suits were also commenced by petitioner Hapag-Lloyd, as owner of the Brandenburg, and by petitioners Stork Amsterdam N.V., *et al.*, as owners of certain cargoes laden aboard the Brandenburg, in January of 1973. Following consolidation of these fourteen cases on March 2, 1973, Texaco moved for dismissal of all cases on grounds of trial convenience factors.[20]

Without hearings, depositions,[21] or substantive discussion,[22] the District Court endorsed the Magistrate's report and dismissed all actions.[23]

On Brandenburg Petitioners' appeal to the Second Circuit three separate opinions and a modification were handed down, the result being to affirm dismissal.

The Majority Opinion (Anderson, *C.J.*) erroneously interpreted the United States cases as still holding that a shipowner's duty to locate and mark his wreck ceases once governmental authority "has undertaken the task".[24] Since that is the rule in England, the majority saw no difference

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[19] *Id.*

[20] 58a-95a.

[21] 247a, 252a-254a, 255a.

[22] 14b.

[23] 26b-27b; see also note 6 at 21b.

[24] 10b, note 6.

between the law of the United States and that of England;[25] was therefore not able to perceive the grave injustice resulting to Petitioners by their remission to English law which deprives them of all remedy; and decided that the most convenient forum for the disputes would be England.[26]

The concurring opinion (Mansfield, *C.J.*), which joined in holding that England would be a more convenient forum, also failed to appreciate the central point of this case. It is not a question of the English law being somewhat "less favorable" [27] to Petitioners; English law gives Petitioners ***no remedy at all.***

The dissent (Oakes, *C.J.*) suggested in effect that the Majority Opinion ignored three basic aspects of the modern admiralty—the myth of foreign registry of vessels beneficially owned and controlled by U.S. companies;[28] the extraordinary development of economical international jet travel in the nearly thirty years since this Court's leading *forum non conveniens* case[29] was decided; and the heightened mutual stake today of all maritime nations in preserving the tremendously busy international shipping lane of the English Channel against the increased overall dangers to life, limb, property and environment posed by modern supertankers and other huge ships.[30] Oakes, *C.J.*, went on to state that, even regardless of these factors, *forum non conveniens* should be held inapplicable.[31]

Lastly, on rehearing, the Second Circuit excised its erroneous statement, pointed out by Petitioners, with regard

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[25] *Id.*
[26] 8b.
[27] 10b.
[28] 13b.
[29] *Gulf Oil* v. *Gilbert*, 330 U.S. 501 (1947); *see* 15b.
[30] 16b.
[31] 17b.

to the nature and proof of foreign law,[32] but did not alter its erroneous conclusion as to the applicable United States law, and therefore never reached the main thrust of this Petition—that United States maritime law as correctly interpreted offers Petitioners a remedy; English maritime law offers no remedy; and therefore justice requires retention of United States jurisdiction. The petition for rehearing, and for rehearing in banc, were denied by Orders of the Second Circuit on August 6, 1975.

Reasons for Granting the Writ

POINT I

This Court Should Settle a Vital Point of Federal Law: That It Is An Essential Requirement For Application of *Forum Non Conveniens* That There Be An Alternative Forum Providing Plaintiffs With An Effective Remedy.

The cornerstone of the doctrine of *forum non conveniens* is justice. Petitioners contend that justice in this case requires retention of jurisdiction here, since this forum gives plaintiffs a remedy which *does not exist at all* in England. If Petitioners are sent to England, as the Court below would do in the name of convenience, there will be *no* remedy for the negligence of Respondent Texaco's failure to locate and mark their dangerous wreck.

This Court has implied [*Gulf Oil* v. *Gilbert*, 330 U.S. 501, 508 (1947)], and distinguished text writers have agreed, that it is axiomatic that factors of mere convenience must be overridden where the suggested alternate forum provides no effective remedy for plaintiff. As unequivocally

[32] 24b.

stated by Professor Alexander M. Bickel,[33] it " • • • follows from the existence of jurisdiction in the first place, that a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true • • • " and a finding that "the law of the other forum" does not permit "recovery for the wrong libellant alleges • • • should result in an automatic assumption of jurisdiction."

This Court in the leading case of *Gulf Oil* v. *Gilbert*, 330 U.S. 501, 506/7 (1947) has affirmatively and emphatically stated, as applied to jurisdiction over the defendant, that there must be *two* available effective forums:

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

Petitioners submit that the same principle must in logic and justice apply with respect to the substantive cause of action. Of what use is it to plaintiffs to provide them with an alternative forum in which they are able to obtain service of process and jurisdiction *in personam* of the defendant, if the Courts of that alternative forum provide plaintiffs no remedy?

In the same leading *Gulf Oil* case this Court has indicated, though not directly stated, that an effective alternative forum preserving plaintiffs' remedy is a condition precedent to application of *forum non conveniens:*

> " • • • plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass' or 'oppress' the defendant by in-

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[33] *Forum Non Conveniens in Admiralty*, 35 Cornell Law Quarterly 12, at 28 (1949).

flicting upon him expense or trouble *not necessary to his own right to pursue his remedy.*" (*Emphasis added*), 330 U.S., at p. 508.

This Court thus clearly implies in *Gulf Oil* that even if a defendant has a strong balance on issues of convenience and expense, plaintiff is nevertheless entitled to its chosen forum *when that forum is necessary to plaintiff's remedy.*

The reasons for this principle are clear and compelling: convenience considerations under the *forum non conveniens* doctrine should not be capable of employment to extinguish a plaintiff's properly served complaint without a trial on the merits.

Petitioners ask that this Court correct the injustice resulting from the decision of the Court of Appeals for the Second Circuit in this case, by this Court's making explicit for the first time the important principle of federal law clearly implied in *Gulf Oil*, that no considerations of convenience can justify forcing a plaintiff into an alternate forum which extinguishes his cause of action.[34]

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[34] The same principle has been frequently stated by the lower Federal Courts. *Tivoli Realty* v. *Paramount Pictures*, 89 F.Supp. 278 (Del. 1950), *mand. denied* 186 F.2d 111, *cert. den.* 340 U.S. 953, *appeal dismissed* 186 F.2d 120. (Plaintiff entitled to know he could "*effectively bring suit* against the defendant in the more convenient forum"; 89 F.Supp. at 281, *emphasis added*); *Chemical Carriers* v. *L. Smit & Co.'s Internationale S.*, 154 F.Supp. 886 (S.D.N.Y. 1957) (jurisdiction retained, since " . . . the practical result of compelling libellant to litigate in the Rotterdam courts might well be to *deprive it of all remedy*," 154 F.Supp. at 889, *emphasis added*). This same passage was quoted with approval in *General Motors Overseas Operation* v. *S.S. Goettingen*, 225 F.Supp. 902, 907 (S.D.N.Y. 1964) ("Parties will not be remitted to a foreign tribunal, despite an agreement, if substantive rights would be substantially affected," 225 F.Supp. at 907); *The Apurimac*, 7 F.2d 741 (E.D. Va. 1925), *affirmed* as *Heredia* v. *Davies*, 12 F.2d 500 (4th Cir. 1926) (jurisdiction should be retained where an injury has been sustained " . . . for which a remedy is

It is essential to justice in this and in future cases that this Court explicitly state this important principle of federal law, so strongly implied in *Gulf Oil*. Not convenience, but *justice* must be the decisive factor. Interestingly, agreement with this principle is clearly implied by the Majority below, citing *Gulf Oil:*

> "An action may properly be dismissed under the doctrine of *forum non conveniens* when the convenience of the parties *and the ends of justice* weigh heavily against the retention of jurisdiction. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507-8 (1947) . . ." (*emphasis added*)[35]

The Court below, however, never reached or considered the effect of this vital principle in the present case. Instead, it discussed the discretion of a district court to apply the *forum non conveniens* doctrine " . . . even though the law applicable in the alternative forum may be *less*

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given by American law, but which is without remedy under the Peruvian law", 7 F.2d at 742; The Fourth Circuit affirmed, stating that jurisdiction should be retained when " . . . necessary to prevent a failure of justice, or when the rights of the parties would be thereby best promoted", 12 F.2d at p. 501; *Gkiafis* v. *S.S. Yiosonas*, 387 F.2d 460 (4 Cir. 1967) (Lower Court abused its discretion in dismissing seaman's complaint, since seaman's remedy in Greece was at best uncertain, and retention of jurisdiction was therefore necessary " . . . 'to prevent a failure of justice [and because] the rights of the parties [will] be thereby best promoted' ", 387 F.2d, at 464); *Flota Maritima Browning* v. *The Ciudad de La Habana*, 181 F.Supp. 301 (D. Md. 1960) (jurisdiction retained because " . . . it is very doubtful whether libellant can hope to receive justice in Cuba. *That is the dominant factor to be considered in every case when such doubt exists*", 181 F.Supp., at 311, *emphasis added*). See also *Royal M.S.P. Co.* v. *Companhia De Navegacao Lloyd Brasileiro*, 27 F.2d 1002, 1003 (E.D.N.Y. 1928) and *Varvovsos* v. *Pezas*, 41 F.Supp. 318, 319 (S.D.N.Y. 1941).

[35] 5b.

favorable to the plaintiffs' chances of recovery." (*emphasis added*)[36]

This illustrates dramatically the great need for this Court to spell out explicitly the implication of *Gulf Oil*. The present case is not a matter of "more" or "less" favorable law. Petitioners have a cause of action in the United States; they have none in England. Since there is thus *no alternative effective forum*, factors of convenience have no legitimate place.

It would not, we respectfully submit, "emasculate"[37] *forum non conveniens* to hold that it is a condition precedent to application of the doctrine that the suggested alternative forum provide Petitioners with *effective remedies*.

The Majority Opinion, in stating that Petitioners ". . . will not be significantly inconvenienced by dismissal,"[38] failed to perceive the fatal prejudice to Petitioners which would result from their being denied United States jurisdiction. This failure results from the Opinion's totally wrong reading of the United States authorities, which led the Majority below to conclude that there was no significant difference between the law in England and in the

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[36] 10b. Judge Mansfield, in his concurring opinion, similarly expressed the view that jurisdiction should not be retained " . . . merely because of the possibility that our federal courts might interpret General Maritime Law more favorably to their cause or award more liberal damages to them than would the High Court of England." 23b.

As below discussed, neither of these statements are apposite to the present case, in which *no* remedy exists under English maritime law.

[37] 10b.

[38] 7b.

United States.[39] This conclusion by the Court of Appeals for the Second Circuit is not only demonstrably in error, but also creates a clear conflict with the decisions of the Sixth Circuit.

Texaco within a few hours of the collision of Texaco Caribbean with Paracas notified Trinity House (roughly the equivalent of the United States Coast Guard). Trinity House agreed to act, and dispatched its vessel Siren to locate and mark the wrecks. In England this entirely relieves Texaco of any further liability, *even though* the totally ineffective Siren had not found the wrecks before Brandenburg struck and sank.

In the United States—if this Court will resolve the conflict between the enlightened rule of the Sixth Circuit and the retrograde decision by the Second Circuit below—it does not. Until the decision below, the Second and Sixth Circuits uniformly held that a wreck owner was not relieved of his duty to locate and mark his wreck by a governmental undertaking to search, or by unsuccessful official efforts.

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[39] This accident was on the high seas, 377a, 11b. The law applied to a collision " . . . on the high seas, not within the jurisdiction of any nation . . ." is " . . . the General Maritime Law, as understood and administered in the courts of the country in which the litigation is prosecuted," *The Belgenland*, 114 U.S. 355, 369 (1885). The basis of the present suits is to impose liability on Texaco Caribbean's owners for the total loss of the Brandenburg and her cargo and heavy loss of life of her crew when she struck the unlocated, unmarked sunken wreck of Texaco Caribbean. The owner of a hazardous wreck has a duty under the General Maritime Law to locate and mark it, so as to avoid harm to others. *Madeleine Wheeldon* v. *United States of America*, 184 F.Supp. 81, 83 (N.D. Cal. 1960); *The William Nelson*, 296 F. 553, 556 (E.D.N.Y. 1923); *The Plymouth*, 225 F. 483 (2d Cir. 1915). There is, however, a crucial difference between the General Maritime Law as applied by the English Courts, and by the United States Courts (prior to the Second Circuit's decision below), as appears from Point II.

POINT II

This Court Should Resolve the Conflict Between the Second and Sixth Circuits and Settle the Enlightened and Responsible Rule of Federal Law That the Owner of a Dangerous Sunken Wreck Has a Continuing Non-Delegable Obligation, Not Relieved by Ineffectual Efforts by Governmental Authorities, To Use Utmost Diligence To Locate and Mark His Wreck.

We do not quarrel on this Petition with the conclusion of the Majority Opinion of the Court below that the *English* rule provides that ". . . an owner is only relieved of responsibility after the public authority has taken action to take over the marking of the wreck."[40] Since Trinity

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[40] Note 6, Majority Opinion, 10b. The General Maritime Law as applied by the English Courts is stated by the Privy Council (House of Lords) in *The Utopia* (1893) A.C. 492, and by the Court of Appeal in *The Douglas* (1882) 7 P.D. 151. These authorities established in England an inflexible rule which would relieve Texaco from liability for its failure to locate and mark its wreck simply because government authority (Trinity House, the official lighthouse authority in England) was informed of the wrecked Texaco Caribbean and was making efforts, however limited and unsuccessful, with its ship Siren to locate and mark the wreck. The rule is most clearly stated in the leading case of *The Douglas*. The Douglas having sunk, her Mate instructed a tug captain to notify the Harbormaster of the casualty, and request him to take care of the wreck. A message was returned to the Mate that the harbormaster would undertake to light the wreck. Before this was done, another vessel struck the unlit wreck, and sank. The Douglas' owners were exonerated by the English Court of Appeal simply on the basis of their having given ". . . the harbormaster notice to perform the duty" of locating and marking the wreck (7 P.D. at p. 161), and reasonably assuming that the Harbormaster would undertake this duty.

See also Marsden, *The Law of Collisions at Sea*, 4 British Shipping Laws (1961), p. 80.

House, the government authority, had ". . . taken action to take over the marking of the wreck" [41] before the Brandenburg collided with the as yet unmarked wreck, it follows under English law as correctly interpreted by the Majority Opinion that Petitioners would have no cause of action against wreck-owner Texaco in England.

The Majority below, however, did not pause to reflect that this rule would deprive Petitioners of all remedy, because the Majority Opinion erroneously concluded that the United States rule was substantially identical to the English rule, incorrectly stating as a general rule that our Courts have "*similarly* recognized that an owner's duty to mark a wreck ceases once the Coast Guard has undertaken the task." (*emphasis added*)[42]

This ruling by the Second Circuit in the present case is in direct conflict with (A) a decision by the United States Court of Appeals for the Sixth Circuit under similar circumstances, and (B) the enlightened policy of the Second Circuit's own previous decisions.

A. The present decision by the Court of Appeals for the Second Circuit directly conflicts with that of the Sixth Circuit in *Ingram Corporation* v. *Ohio River Company*, 505 F.2d 1364 (1974).

The clear thrust of the Majority Opinion by the Second Circuit is that since governmental authority (Trinity House) had ". . . taken action to take over the marking of the wreck," [43] by dispatching its vessel Siren, Petitioners would have no recovery in the United States Courts for Texaco's negligent failure to locate and mark the wreck.

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[41] Note 6, Majority Opinion, 10b.

[42] *Id.*

[43] *Id.*

The holding of the Sixth Circuit in *Ingram* is in direct conflict with this Majority Opinion of the Second Circuit.

In *Ingram*, the tug Zimmer had sunk one of her barges in navigable waters of the Ohio river. The tug's master attempted to mark the wreck by attaching a small empty grease can at the upstream end of the sunken barge, and an empty white plastic bottle to the barge's downstream end. After asking the river lock authorities to contact the United States Coast Guard and inform them of the sunken barge, the tug then proceeded upriver with her remaining barges. The Coast Guard was later informed and advised the barge's owners that if they could not suitably mark the barge the Coast Guard would undertake marking it; the Coast Guard was then requested to mark the wreck with a lighted buoy as soon as possible. The barge owner paid no further attention to the matter, while the Coast Guard in the meantime issued radio and teletype warnings to mariners, and dispatched a USCG cutter to the area.[44] On the following day, the barge Illinois came into collision with the still inadequately marked wreck, while the cutter was still enroute.

Thus in *Ingram*, as in the present case, governmental authority "undertook the task". The Sixth Circuit however (in direct conflict with the Second Circuit below) squarely held that this fact did *not* relieve the owner of his continuing, non-delegable duty properly to mark the wreck, and held him liable to the owner of the barge Illinois. The Sixth Circuit quoted with approval and adopted an earlier Second Circuit case which specifically rejected the English rule, *Berwind-White Coal Mining Co.* v. *Pitney*, 187 F. 2d 665 (2d Cir. 1951) where it was stated:

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[44] 505 F.2d at pp. 1367-8.

> "Although the Coast Guard's search for the wreck may, if made with due diligence in the light of the facts within the knowledge of the owner, operate to discharge the owner's duty, *the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark.* The dicta in Petition of Anthony O'Boyle, Inc., 2 Cir. 161 F. 2d 966, 967, and Red Star Towing & Transportation Co. v. Woodburn, 2 Cir. 18 F. 2d 77, 79, which may indicate the contrary should be discounted accordingly." (*Emphasis added*). 187 F. 2d at 669.

Berwind, and the case of *Morania Barge No. 140, Inc.* v. *M. & J. Tracy Inc.*, 312 F. 2d 78 (2 Cir. 1962) which followed it, were wrongly cited by the Majority Opinion of the Second Circuit in the present case as supporting the English rule, which *Berwind* on the contrary dramatically *rejected.*

Under the law of the Sixth Circuit (and formerly of the Second), Texaco's duty to locate and mark the wreck of Texaco Caribbean *continued despite* Trinity House's ineffective undertaking of the task of locating and marking.

In sharp contrast, the Second Circuit in the present case resurrects the English rule, under which Texaco's duty would cease when Trinity House dispatched the Siren, *24 hours before Brandenburg's disaster.*

Petitioners respectfully request that this Court resolve this conflict between the Circuits by announcing the straight-forward and enlightened policy stated in *Berwind*, and currently adopted by the Sixth Circuit in *Ingram:* that the owner of a wreck menacing navigation is not permitted to unload all responsibility for locating it onto governmental shoulders, but instead *must himself* continue to take all reasonable measures to locate and mark it, until the wreck is in fact *permanently* and *conspicuously marked.*

B. By Resolving the Conflict in favor of the Enlightened and Responsible Rule of the Sixth Circuit, this Court can establish an Enlightened Federal Policy to promote Safety of the Sea Lanes.

The Sixth Circuit's *Ingram* rule expresses a straightforward and important maritime policy: the owners of a hazardous wreck are not permitted to dump all responsibility for locating it upon governmental authorities; even though those authorities may have "undertaken the task," the wreck owners must themselves independently take all reasonable measures to see that *effective* steps are taken to locate and mark it.

This represents an enlightened federal policy of promoting safety of the sea lanes. The Sixth Circuit's holding protect innocent shipping and the marine environment by requiring wreck owners, regardless of unsuccessful governmental efforts, to continue searching themselves for their dangerous navigational obstructions until they are actually located and marked. In holding to the contrary, the Second Circuit has erroneously interpreted existing United States law,[45] and taken a giant step backward as well as into con-

[45] The last paragraph of the majority opinion's discussion in in Footnote 6 (at 10b) page 4384, correctly points out that the Second Circuit's 1915 decision in *The Plymouth*, 225 F. 438, and its 1927 decision in *New York Marine Co.* v. *Mulligan*, 31 F.2d 532, approved the rule of the leading English case of *The Douglas*, [1882] 7 P.D. 151—that the mere fact that a governmental authority simply accepts responsibility relieves a shipowner of any further duty to locate and mark the wreck. However, the next two cases cited in Footnote 6 (at 10b)—*Berwind-White Coal Mining Co.* v. *Pitney Eureka No. 1107*, 187 F.2d 665 (2nd Cir. 1951), and *Morania Barge No. 104, Inc.* v. *M. & J. Tracy, Inc.*, 312 F.2d 78 (2nd Cir. 1962)—do *not* support the majority opinion's statement that the United States Courts follow the old English rule. On the contrary, they specifically *rejected* that rule, and established a new and enlightened policy. These two decisions wisely held shipowners independently responsible to locate and mark their wrecks, without regard to governmental undertakings, until actual marking by the governmental authority.

flict with the Sixth Circuit. The previous decisions of the Second Circuit in *Berwind-White* and *Morania*, adopted and followed by the Sixth Circuit, wisely held shipowners independently responsible to locate and mark their wrecks, without regard to governmental undertakings until *actual marking* by the governmental authority had been *completed*.[46]

Circuit Judge Oakes in his vigorous dissent to the Majority Opinion of the Second Circuit in the present case emphasized the importance of this responsible policy to the modern shipping world:

> "A third cobweb, I fear implicit in the majority opinion if not the entire law of admiralty (but visualized in the last few years, if not yet articulated by the Supreme Court), is the tendency to view shipping on the high seas as if it were still being conducted by sailing vessels in times gone by, rather than by supertankers and other huge, speedy, modern steel behemoths, whose control is more difficult to exercise, whose wrecks are more hazardous, and whose overall dangers to life, limb, property and environment are greater than anything dreamed of, say, when the Privy Council (House of Lords) sat on The Utopia [1893] A.C. 492. So,

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[46] Thus, Judge Leonard T. Moore (sitting by designation in *Marine Towing, Inc.* v. *Red Star Towing & Transportation Co.*, 1974 A.M.C. 691 (E.D.N.Y. 1973), following careful analysis of *Berwind* and *Morania*, held that the shipowner's duty to mark had not ceased where the Coast Guard had not yet "actually marked the wreck with its own buoy" (1974 A.M.C. at 694) *even though* the Coast Guard had in fact temporarily hung both a flag and a lantern on the mast of the wrecked vessel, *and* the wreck owner had left the area "with the knowledge that a Coast Guard buoy tender was due to arrive at any moment to place a large wreck buoy over the Ocean Queen." The Court held that the wreck owner's continuing duty would not end until the Coast Guard "had marked the wreck with a more permanent buoy."

too, has the entire concept of national suzerainty over international waters changed. In the search for oil, fish and other ocean resources three-mile limits have become 12 and are being claimed at 200 miles; are we to transfer to Ecuador, for example, cases involving collisions near its limits? *See generally United States* v. *Maine*, 43 U.S.L.W. 4359 (U.S. Mar. 17, 1975). More to the point, Brittania no longer rules the waves, and while England (as well as France and Holland) has a territorial and environmental interest in connection with the English Channel, outside the three-mile limit that strait is international water, a tremendously busy commercial shipping lane for European common market and other traffic; as such, it cannot any longer be said, as the majority says, 'England clearly has the more direct interest in promulgating and enforcing rules for safe passage' through the channel".[47]

The dramatic increases in the hazards of shipping today so eloquently described by Judge Oakes are all too vividly illustrated by the present case, in which the lives of many crewmembers of Brandenburg were needlessly lost together with the entire ship and cargo. These dreadful losses were the direct result of the fact that Texaco relied exclusively on the pathetically ineffective measures taken by Trinity House, an action condoned by the old English rule now again adopted by the Second Circuit. Texaco declined to use the Orca (which could have located and marked Texaco's wrecks well before the loss of the Brandenburg), or indeed to take *any independent action whatsoever* to locate and mark its dangerous wreck lying submerged in the shallow Dover Straits, the world's busiest ocean-going thoroughfare.

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[47] 16b-17b.

Seafarers, ships and cargoes of the United States and every maritime nation, together with the fragile maritime ecosystem itself, are all equally imperilled by such fundamentally irresponsible conduct. The present conflict between the Second and Sixth Circuits over this important and unsettled question of federal admiralty law should be resolved, by the announcement in this case of a rule settling a continuing and non-delegable duty on the owner of a hazardous wreck requiring him, until his wreck is both located and permanently and conspicuously marked, to work independently to that end regardless of parallel governmental efforts.

CONCLUSION

In sending plantiffs to a forum which provides no remedy, the Court of Appeals below has committed a flagrant injustice. In correcting that injustice, this Court would settle for the first time two important issues of federal law.

1. In resolving the conflict between the Sixth Circuit decision in *Ingram* and the Second Circuit majority opinion below, this Court should settle the enlightened and responsible rule of federal law that the owner of a dangerous sunken wreck has a continuing non-delegable obligation, unaffected by ineffectual governmental efforts, to use utmost diligence to locate and mark his wreck.

Under that enlightened rule Petitioners would have a remedy under United States Federal law which would be entirely denied to them under the General Maritime Law as applied by the English Courts. Therefore,

2. This Court should for the first time make explicit the implied rule of *Gulf Oil* that no factors of "con-

venience" can ever justify requiring a plaintiff to go to another forum in which he has no remedy.

Because of its clear error as to the first of these questions, the Majority Opinion below wrongly concluded that the United States law is not substantially different from the English law. The Majority naturally therefore never reached or dealt with the vital second question.

We respectfully request that *certiorari* be granted to the end that this Court at the same time may redress the grave injustice which the decision below causes to Petitioners, as well as to the Representatives of the lost crew members, depriving them of all remedy; and may also for the first time clarify and settle these two highly important rules of federal law.

October 23, 1975.

Respectfully submitted,

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APPENDIX

PAGE

Majority (Anderson, C.J.) and Dissenting (Oakes, C.J.) Opinions in The Second Circuit 1b

Separate Concurring Opinion (Mansfield, C.J.) in The Second Circuit 22b

Per Curiam Opinion Striking Error in Majority Opinion, But Deciding Against Rehearing in The Second Circuit 24b

Second Circuit's Order (Clerk) Denying Rehearing 24b-1

Second Circuit's Order (Kaufman, C.J.) Denying Rehearing In Banc 25b

Memorandum Endorsement by Southern District of New York (Metzner, U.S.D.J.) Adopting Magistrate's Report 26b

Magistrate's Report Recommending Dismissal of Petitioners' Complaints (Jacobs, U.S.M.) 28b

Majority and Dissenting Opinions of the Second Circuit Court of Appeals Entered June 25, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 195 and 205—September Term, 1974.

(Argued April 2, 1975 Decided June 25, 1975.)

Docket Nos. 74-1958
and 74-1468

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of Hagen Pastewka, Deceased and Monica Pastewka, Individually,

Plaintiffs-Appellants,

v.

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees,

and Consolidated Cases.

Before:

ANDERSON, MANSFIELD and OAKES,

Circuit Judges.

Appeal from the granting of the defendants' motion to dismiss on the ground of *forum non conveniens,* in the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge.*

Affirmed.

Majority and Dissenting Opinions of the Second Circuit Court of Appeals

ANDERSON, *Circuit Judge:*

On January 12, 1971, the M/V Brandenburg, a German vessel, struck the wreckage of the S/T Texaco Caribbean, a Panamanian vessel, owned by Texaco Panama, Inc. (Texpan), a foreign subsidiary of Texaco, Inc. (Texaco), in the Dover Straits 12 miles from the coast of England, where the Texaco Caribbean lay submerged as a result of a collision the previous day with the M/V Paracas, a Peruvian vessel. Suits were brought in the Southern District of New York by Hapag-Lloyd, A.G., and Stork Amsterdam N.V. Industrias Lacteas Dominicanas, S.A., et al., foreign corporations, against Texaco under geenral maritime law for the loss of the Brandenburg and her cargo, respectively, and by 12 estates of deceased German seamen, through the Public Administrator of the County of New York, against Texaco and Texpan under the general maritime law and the Death on the High Seas Act, 46 U.S.C. §761, et seq. The claims were based on defendants' alleged failure properly to mark the wreckage of the Texaco Caribbean.

The defendants filed a motion to dismiss these actions which was granted by the district court under the doctrine of *forum non conveniens* upon the recommendation of the magistrate to whom the motion had been referred. The dismissal was subject, however, to the conditions that the defendants submit to the jurisdiction of the courts in England, where Texpan and several of the present plaintiffs, among others, are parties in pending suits arising from the same series of events, and that the defendants waive any defense of a statute of limitations which they might have there.[1]

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[1] It is undisputed that the following legal actions are pending in England: (1) owners of the Brandenburg's cargo against the

Majority and Dissenting Opinions of the Second Circuit Court of Appeals

The evidentiary material, submitted by the parties, disclosed the following undisputed facts. Texaco Overseas Tankships Limited (TOT), a British subsidiary of Texaco which managed the Texaco Caribbean for Texpan, notified Trinity House, a British corporation with the statutory duty of locating and marking wrecks off the coast of England, of the collision between the Paracas and the Texaco Caribbean, while the stern section of the latter was then still afloat, and requested that action be taken to mark the area. In response thereto, Trinity House dispatched its ship Siren to the scene, but by the time she arrived, the stern section of the Texaco Caribbean had sunk. The Siren mistakenly moored at the edge of an oil slick which she assumed indicated the location of the wreck and warned other vessels to avoid that area. Later, members of the crews of two British fishing vessels saw the Brandenburg run into the wreck of the Texaco Caribbean which was actually located about a mile from the Siren's anchored position. This occurred about 0730 on January 12, 1971. The Brandenburg sank immediately.

Prospective witnesses, such as employees of TOT, surviving crew members of the Texaco Caribbean, who are Italian nationals, employees of Trinity House, and the English crew members of the fishing vessels, all reside in or near England.

Paracas, Texaco Caribbean, and Trinity House; (2) Texaco Caribbean against the Paracas; (3) the Paracas against Texaco Caribbean; and (4) the Brandenburg against Trinity House.

There are also pending in the United States District Court for the District of Delaware 12 suits, similar to those brought in this court, against Texaco and Texpan by the heirs and representatives of the deceased German seaman.

The plaintiffs had served numerous interrogatories and requests for the inspection of certain documents upon Texpan's counsel before responding to the motion to dismiss, but the district court issued a protective order limiting discovery to what in its opinion might disclose the location of important sources of proof.

In response to the interrogatories allowed, Texpan stated that TOT had exclusive authority under the Ship Management Agreement to take all necessary action to mark the wreck of the Texaco Caribbean, and that no one residing in the United States had been consulted about the operation.

Plaintiffs, nevertheless, still claimed that Texaco had supervised the search operation from New York, and many of the witnesses and documents, which were essential to the proof at the trial, were there; and that, therefore, trial in New York would best serve the convenience of the parties. The evidentiary material offered in support of their contention was, however, of insubstantial value. It consisted of a copy of an inter-office memorandum written by an employee of Smit-Tak, a Dutch company operating a fleet of wreck-search vessels, which stated that Smit-Tak had offered its services to TOT on the day of the Paracas collision, but that TOT had replied that it could not hire Smit-Tak without authorization from Texaco's New York office. Plaintiffs also served a notice to admit that a Texpan official had signed a letter in 1967 (four years before the occurrences in the present case), written on Texpan stationery bearing a New York address, and further proposed to take depositions of Texpan officials regarding matters which had already been covered in the interrogatories and affidavits but the district court issued

a protective order barring both the notice to admit and the additional discovery. This appeal followed.

The sole issue presently before this court is whether or not the district court abused its discretion in granting the motion to dismiss the action on the ground of *forum non conveniens*.

An action may properly be dismissed under the doctrine of *forum non conveniens* when the convenience of the parties and the ends of justice weigh heavily against the retention of jurisdiction. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507-8 (1947); *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633, 645-6 (2 Cir.), *cert. denied*, 352 U.S. 871 (1956). Another factor to be considered is the public interest which includes a limitation on the use of a local forum for resolution of controversies which lack significant local contracts, especially when trial of the act would create administrative and legal problems for the courts. *Gulf Oil Corp.* v. *Gilbert, supra*, at 508. This is not a case where the plaintiffs or any of them has a "home jurisdiction" in the Southern District of New York. *Koster* v. *Lumbermens Mutual Co.*, 330 U.S. 518, 524 (1947). Although plaintiffs should rarely be deprived of the advantages of their chosen forums, "the doctrine leaves much to the discretion of the court," [2] whose decision, absent a clear showing of abuse of discretion, may not be disturbed. *Fitzgerald* v. *Westland Marine Corp.*, 369 F.2d 499, 502 (2 Cir. 1966).

Among the major factors bearing on the convenience of the parties are ease of access to sources of proof, the availability of compulsory process and the cost of obtaining willing witnesses. *Gulf Oil Corp.* v. *Gilbert, supra*, 330

[2] *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947).

U.S. at 508; *Fitzgerald* v. *Westland Marine Corp., supra,* at 501.

Even on the plaintiffs' statement of the facts, the convenience to all parties of trying these cases in the English courts and the vast inconvenience to all of trying the cases in New York, overwhelmingly outweighs the temporary convenience to the plaintiffs of getting access to evidentiary material in Texaco's possession in New York.[3]

What the plaintiffs want to prove is that TOT could make no move with regard to buoying the wreck of the Texaco Caribbean or otherwise take steps to warn mariners

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[3] Plaintiffs argue that the district court prevented them from adequately demonstrating that Texaco had directed the search. Because we hold that the convenience of the parties favors dismissal under either version of the facts, plaintiffs were not prejudiced by the limitations imposed by the district court upon the scope of discovery.

The grant and nature of protection with respect to discovery is within the discretion of the trial court, *Galella* v. *Onassis,* 487 F.2d 986, 997 (2 Cir. 1973), and we find that the district court did not abuse its discretion by issuing the protective orders in this case. The general standard is that parties are entitled to obtain discovery regarding any matter which is relevant to the subject matter involved in the pending action. F. R. Civ. P. 26(b)(1). The discovery and disclosure at issue sought the substance of all reports made by employees of TOT, and all requests made by Texpan to locate or mark the wreck; also requests were made for copies of all documents prepared by any survivors of the Texaco Caribbean, and for copies of reports upon any investigation "into any of the circumstances relevant to the collision." But a motion to dismiss for *forum non conveniens* does not call for a detailed development of the entire case; rather discovery is limited to the location of important sources of proof. It is undisputed that the proposed depositions dealt with topics for which full information was already available. Nor did the district court in this case abuse its discretion, on this motion to dismiss for *forum non conveniens,* in failing to require detailed disclosure by the defendants of the names of their proposed witnesses and the substance of their testimony.

of the obstruction without orders from Texaco in New York. But TOT is in England and its officers and records are there. Moreover, Texaco does business in England. The plaintiffs should find their best proof right there, not only with regard to Texaco but also as to any liability on the part of Texpan. In fact, the plaintiffs' cases on liability will depend in large measure upon the knowledge and activities of such witnesses as the employees of TOT and Trinity House, who are not parties to this litigation, but who directly participated in the events which gave rise to it. The United States District Court in New York, however, has no power to subpoena any of these witnesses.[4] It is unlikely that many would be willing to travel to New York to testify; and the cost, in any event, would be prohibitively great. Those witnesses who reside in England are subject to the compulsory process of her courts; and the others, if willing to testify, could do so there at reasonable expense.

The plaintiffs, moreover, will not be significantly inconvenienced by dismissal. The district court granted the mo-

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[4] The only prospective witnesses who reside in the United States, and who are not parties, are the members of the crew of the Leslie Lykes, most of whom reside in Florida, and who observed the Paracas collision and could testify that the stern section of the Texaco Caribbean remained afloat for several hours and that her wreckage, therefore, could have been properly marked by the fully-equipped Smit-Tak vessel patrolling in the area. These crew members, except for the unlikely chance that the Leslie Lykes were to stop in New York, which it has not done, however, since 1966, would not be subject to subpoena in New York and their testimony would have to be taken by depositions. The surviving crew members of the Texaco Caribbean, who reside in Italy, presumably could provide similar testimony and many of these witnesses will be present in England in connection with the trials of the related suits there pending.

tion on the express condition that Texaco submit to the jurisdiction of the courts in England where, upon court order, personnel will be available to testify and necessary documents may be produced. As the real parties in interest are either German citizens and residents or foreign corporations, it appears that a trial in England, where several are already parties to related suits, would be considerably less burdensome than a trial in New York. The balance of convenience under these circumstances clearly tips in favor of dismissal.

Liability for a collision on the high seas between vessels flying different flags is determined according to the general maritime law as interpreted by the courts of the forum in which the action proceeds. *The Scotland*, 105 U.S. 24, 29 (1881); *The Belgenland*, 114 U.S. 335, 369 (1885); *Kloeckner Reederei* v. *A/S Hakedal*, 210 F.2d 754, 756 (2 Cir. 1954), *cert. dism.*, 348 U.S. 801 (1955); *Pacific Vegetable Oil Corp.* v. *S/S Shalom*, 257 F. Supp. 944, 946 (S.D.N.Y. 1966). England apparently accepts this doctrine. *The Buenos Aires*, 5 F.2d 425, 437 (2 Cir. 1925).[5] Plaintiffs claim that the difference between the interpretation by the English and American courts of general maritime law might adversely affect their chances of prevailing on the merits, and that "the ends of justice" require that they be allowed to retain the advantageous interpretations of the law made by their chosen forum, even if, under all the other criteria, that forum is an inconvenient one.

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[5] "The high seas . . . are subject to the jurisdiction of all countries . . . The question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common law of England; but by the maritime law which is part of the common law of England as administered in this country." *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 10 Q.B.D. 521, 537 (1883). See, 7 Halsbury's Laws of England (3d ed.) 87-88.

Plaintiffs cite *The Utopia*, 18 A.D. 402 (1892), and *The Douglas*, 7 P.D. 151 (1882), as authority for the proposition that, under general maritime law as applied by the courts in England, the duty of an owner ceases as soon as he notifies a governmental agency of the wrecking of his vessel and requests that the government, or its agency, take action to locate and mark the wreck. As a result, plaintiffs argue that defendants would be entitled to judgment as matter of law in England merely because TOT had asked Trinity House to locate and mark the wreck of the Texaco Caribbean; whereas they claim in the United States the critical issue is whether an owner took all reasonable precautions to prevent injury to another.[6]

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[6] The district court made no finding as to whether the duty of an owner to mark the wreckage of its vessel does in fact differ under general maritime law as presently applied by the English and American courts, and it could not have properly done so because foreign law is a question of fact which must be proven by expert testimony. See, *Usatorre* v. *The Victoria*, 172 F.2d 434, 438-9 (2 Cir. 1949). The plaintiffs cited *The Utopia* and *The Douglas* and their own interpretations of them as sole authority for the English law. But the collisions at issue in *The Utopia* and *The Douglas* occurred after the port authority had assumed complete physical control of the wrecks and both cases clearly state that, until the port authority had assumed physical control, the owners had a duty to take all reasonable steps to protect other vessels from running afoul of the wrecks.

"The result of these authorities [citing *The Douglas* among others] may be thus expressed.

The owner of a ship sunk whether by his default or not . . . has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two

Majority and Dissenting Opinions of the Second Circuit Court of Appeals

A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. *Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413, 418-20 (1932). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover. But the issue remains one of balancing the relevant factors, including the choice of law.

Any difference between the general maritime law as interpreted and applied in the United States and England would affect plaintiff's rights of recovery only if it could

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things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect." *The Utopia*, 18 A.C. 492, 498 (1892).

Although it may be possible to argue that mere notice to the port authority constituted transfer of control, sufficient to relieve the owner of liability, the explicit rationale for the rule given by the court in *The Utopia* was that "it would be dangerous if an owner of a wreck were compelled, in order to avoid a personal responsibility, to interfere with the action taken by a public authority." 18 A.C. at 499. This obviously assumes that mere notice is not enough and an owner is only relieved of responsibility after the public authority has taken action to take over the marking of the wreck.

The courts in the United States, several of which have cited *The Douglas* and *The Utopia* with approval, have similarly recognized that an owner's duty to mark a wreck ceases once the Coast Guard has undertaken the task. *The Plymouth*, 225 Fed. 483 (2 Cir.), cert. denied, 241 U.S. 675 (1915); *New York Marine Co.* v. *Mulligan*, 31 F.2d 532 (2 Cir. 1927); *Berwind-White Coal Co.* v. *Pitney*, 187 F.2d (2 Cir. 1951); *Morania Barge No. 140, Inc.* v. *M. & J. Tracy Inc.*, 312 F.2d 78 (2 Cir. 1962).

be shown that TOT had negligently failed to take some action which would have prevented the Brandenburg from running into the wreck of the Texaco Caribbean *after TOT had notified Trinity House* of the collision.

It is undisputed that defendants would have claims over against the owners of the Paracas and Trinity House, presently parties to the suits in England, for any recovery which plaintiffs may secure in those actions. It is also undisputed that these third parties are beyond the jurisdiction of the United States District Court. The inability to implead other parties directly involved in the controversy is a factor which weighs against the retention of jurisdiction in the Southern District of New York. *Gulf Oil Corp.* v. *Gilbert, supra,* 330 U.S. at 511; *Fitzgerald* v. *Westland Marine Corp., supra,* 369 F.2d at 501-02.

And although the occurrence took place on the high seas, over which all nations share suzerainty, England clearly has the more direct interest in promulgating and enforcing rules for the safe passage of traffic in the English Channel.

Weighing the minimal possibility that plaintiffs might be adversely affected by dismissal, against the clear prejudice which defendants would suffer if jurisdiction were retained, together with considerations of the public interest, and the factors of convenience, we are satisfied that the district court did not abuse its discretion in this case.

It is finally argued that the English courts may choose to apply Lord Campbell's Act rather than the Death on the High Seas Act and that dismissal was, therefore, improper because it might deny relief to certain claimants who would otherwise have a right to recover.

Under §1 of the Death on the High Seas Act, 46 U.S.C. §761, a suit for damages for wrongful death may be main-

tained "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." Under Lord Campbell's Act, on the other hand, "dependent relatives" are not included. 28 Halsbury's Laws of England (3d ed.) 37. But the likelihood that there are any beneficial claimants who would have been entitled to recover in the district court but who will not qualify for recovery in the English courts is conjectural at best.

The broad principles of choice of law established for Jones Act cases in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) were declared equally applicable to cases arising under the general maritime law in *Romero* v. *International Operating Co.*, 358 U.S. 354, 381-4 (1959), and have been applied to suits brought under the Death on the High Seas Act. *Symonette Shipyards Ltd.* v. *Clark*, 365 F.2d 464 (5 Cir. 1966).

The governing principle winnowed from these cases is that the plaintiffs can recover under the Death on the High Seas Act only if they are able to establish some significant national contacts warranting the application of the statute to non-resident aliens. *Lauritzen* v. *Larsen*, *supra*, 345 U.S. at 582-592. The only American contact in this case is Texaco's alleged supervision of the search.

And, although plaintiffs have failed to establish by competent authority the law of the foreign forum, it appears that Lord Campbell's Act applies only when the parties or vessels are British, and, that the English courts otherwise apply the law of the forum with the most significant contacts. 7 Halsbury's Laws of England (3d ed.) 88.

The judgment of the district court is affirmed.

Majority and Dissenting Opinions of the Second Circuit Court of Appeals

OAKES, *Circuit Judge* (dissenting):

We are dealing here with a transitory action, a collision occurring on the high seas, albeit in the English Channel, between vessels of foreign registry, with foreign nationals as plaintiffs. As such we have jurisdiction. *The Belgenland*, 114 U.S. 355, 361-69 (1885). While the case may, and in this dissent will, be dealt with in the traditional terminology of *forum non conveniens* doctrine, it would be well in applying that doctrine here to sweep away some of the cobwebs that fill the attic of admiralty law and hence, with all respect, the majority opinion which speaks strictly within that traditional terminology. In admiralty law the Supreme Court seems to be suggesting that some of those cobwebs need cleaning out. *See United States* v. *Reliable Transfer Co.*, 43 U.S.L.W. 4610 (U.S. May 19, 1975) (divided damages rule replaced by allocation according to comparative fault); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) (seaman's estate could maintain wrongful death action although death occurred on navigable state waters and state law had no provision for death action based on unseaworthiness, overruling *The Harrisburg*, 119 U.S. 199 (1886)).

One cobweb is the myth of registry. While the M/V Texaco Caribbean, whose unmarked wreck evidently caused the loss of life and property here involved, flew the Panamanian flag, it did so purely as a matter of legal and tax convenience to its owners. It was owned in name by a wholly owned Panamanian subsidiary, Texaco Panama, Inc. (Texpan), of Texaco, Inc., an American multinational corporation. While the fiction of corporate entity is given much credence in the admiralty law, *e.g.*, *Zubik* v. *Zubik*, 384 F.2d 267, 273 (3d Cir. 1967), *cert. denied*, 390 U.S.

988 (1968), the courts have disregarded it where necessary to avoid evasion of obligations under American law, *Zielinski* v. *Empresa Hondurena de Vapore*, 113 F. Supp. 93 (S.D.N.Y. 1953) (application of Jones Act to foreign shipowner where foreign seaman resident in United States and stock of foreign shipowner owned by United States corporation), or to promote public policy, *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt.), aff'd, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974) (environmental protection of American lake). *See also Gerradin* v. *United Fruit Co.*, 60 F.2d 927 (2d Cir.), *cert. denied*, 287 U.S. 642 (1932); G. Gilmore & C. Black, The Law of Admiralty 388 et seq. (1957). Here the principal place of business of the parent corporation, Texaco, Inc., is in New York City, in the Southern District of New York. The nominal owner, Texpan, is a wholly owned and controlled subsidiary. While appellees assert that the Texaco Caribbean was managed and operated by Texaco Overseas Tankship Limited (TOT), an English corporation, that too is a wholly owned subsidiary of Texaco, Inc. Moreover, legitimately seeking discovery that has been denied, appellants assert that "the seat of final corporate authority of Texpan is in New York" and that "vital decisions with regard to the [locating and marking of] the wreck of the Texaco Caribbean were made there by Texpan personnel." [1]

[1] Since the discovery sought has been denied, I do not see how it is possible for the majority to suggest that "[t]he evidentiary material offered in support of [appellants'] contentions was . . . of insubstantial value." The majority notes that the evidence offered was an inter-office memo of a Dutch company operating wreck-search vessels and that the memo indicated that its offer of services could not be accepted by TOT without Texaco, Inc.'s authorization. The Dutch vessel, the Orea, was equipped with sonar and other underwater detection devices and located the

I would for purposes of this case disregard the flag of convenience.

The second "cobweb in the attic" does not relate to admiralty alone, but to the entire doctrine of *forum non conveniens*. The almost 30 years that have elapsed since *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), have seen such an extraordinary development of worldwide economical air travel by jet that the deposing of witnesses abroad or bringing them to the United States is a relatively simple and inexpensive matter in a suit of this size.[2] In other words, in the year 1975 no forum is as inconvenient as it was in 1947. One may wonder whether the entire

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Texaco Caribbean and Brandenburg wrecks within a half hour after arrival on the scene at the request of the sunken Brandenburg's owner. The pathetic Siren from England's Trinity House anchored near an oil slick about a mile from the wreck of the Texaco Caribbean after vainly searching for it for hours. It is the gist of appellants' complaint that Texaco in New York failed to approve hiring the Orea to locate and mark the wreck of the Texaco Caribbean before the Brandenburg unsuspectingly struck it. Appellants' discovery below was substantially denied by the trial judge's orders confirming a magistrate's recommendations for limited discovery. Appellants were effectively denied the opportunity to depose any of appellee's officers regarding the issue of dominance and control of Texpan by Texaco in New York. Appellants have in my view been placed in a "Catch-22" situation. *See Lekkas* v. *Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971).

[2] Suppose 20 witnesses had to come to New York from England and 30 from Germany. The total round trip at an average of $750 apiece would be $37,500. The Brandenburg's complaint is for $2,050,000; the Brandenburg Cargo's complaint is for $450,000; the Brandenburg seamen's death claimants' complaints are each for $1,700,000. Moreover, the Supreme Court has noted that international admiralty cases are often dealt with principally by deposition. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 19 (1972).

doctrine of *forum non conveniens* should not be reexamined in the light of the transportation revolution that has occurred since then.[3]

A third cobweb, I fear implicit in the majority opinion if not the entire law of admiralty (but visualized in the last few years, if not yet articulated by the Supreme Court), is the tendency to view shipping on the high seas as if it were still being conducted by sailing vessels in times gone by, rather than by supertankers and other huge, speedy, modern steel behemoths, whose control is more difficult to exercise, whose wrecks are more hazardous, and whose overall dangers to life, limb, property and environment are greater than anything dreamed of, say, when the Privy Council (House of Lords) sat on *The Utopia* [1893] A.C. 492. So, too, has the entire concept of national suzerainty over international waters changed. In the search for oil, fish and other ocean resources three-mile limits have become 12 and are being claimed at 200 miles; are we to transfer to Ecuador, for example, cases involving collisions near its limits? *See generally, United States* v. *Maine*, 43 U.S.L.W. 4359 (U.S. Mar. 17, 1975). More to the point, Brittania no longer rules the waves, and while England (as well as France and Holland) has a territorial and environmental interest in connection with the English Channel, outside the three-mile limit that strait is international water, a tremendously busy commercial shipping lane for European common market and other traffic; as such, it cannot any longer be said, as the majority says, "England clearly has the more direct interest in promulgating and

[3] The whole doctrine might also be reexamined in the light of the dis-person of corporate authority, as here, by the use of multinational subsidiaries to conduct international business.

enforcing rules for safe passage" through the Channel. In this connection, it is interesting to note that the two ships wrecked here were Panamanian and West German, the modern, well-equipped wreck search and salvage vessel (The Orca) that might have marked the wreck of the Texaco Caribbean was Dutch, and the only witness ship,[4] the Leslie Lykes, which stood by for hours as the Texaco Caribbean's stern section slowly sank, was a United States flag freighter.

I come then to the traditional doctrine of *forum non conveniens* which—with or without cobwebs—I still believe to be inapplicable to this case. Mr. Justice Jackson's exegesis in *Gulf Oil Corp.* v. *Gilbert,* 330 U.S at 508, sets forth the principal factors to consider, each of which I will treat—the "practical problems that make trial of a case easy, expeditious and inexpensive" (ease of access to sources of proof, availability of compulsory process, cost of obtaining willing witnesses' attendance, availability of view, etc.); questions of enforceability of a judgment; "relative advantages and obstacles to fair trial." "But," he cautioned, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

Justice Jackson also mentioned the "public interest" factors—court congestion, jury duty, the local interest in having localized controversies decided at home, the advantage of having the local law to be applied applied by a court most familiar with it. 330 U.S. at 508-09. But as stated by

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[4] Appellants deny appellee's assertion that the crews on the British fishing boats witnessed the crash of the Brandenburg. Appellants only agree that the fishing boats aided in rescue hours later.

Majority and Dissenting Opinions of the Second Circuit Court of Appeals

Judge Goodrich in *All States Freight, Inc.* v. *Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952), *quoted in Norwood* v. *Kirkpatrick*, 349 U.S. 29, 31 (1955), the

> doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else.

Here the private "practical" considerations seem to me to weigh in favor of trial here, as opposed to England. Texaco, Inc., has offices in New York, where its corporate and intercorporate records, communications with Texpan and TOT and officers are located. Texpan's offices, according to its answers to interrogatories, are in Panama (closer to New York than to London) and TOT's offices are in Monte Carlo and London, the managers in both offices claimed by Texpan to have been empowered to decide salvage, location and marking questions regarding the Texaco Caribbean. The witnesses would include the surviving crew members of the Texaco Caribbean who are Italian nationals; employees of TOT, Trinity House, two British fishing vessels and employees of two coastal radio stations, who are English; the crew of the Leslie Lykes who are American and who are especially important (*see* majority footnote 4); the surviving crew members of the Brandenburg and death claimants who are German; the officers and crew of the Orca, the Dutch salvage ship, and its owners, who are Dutch. With all of these people located in different places, while there might be some slight balance in favor of trial in England, can it be said to be so great as to *require* dismissal here?

Majority and Dissenting Opinions of the Second Circuit Court of Appeals

There is no question of enforceability of any judgment that might be obtained. There is a practical problem urged by appellees that there might be a judgment here inconsistent with some judgment that might be rendered in the English courts in the litigation there instituted, involving claims by the owners of the Brandenburg and its cargo against the Texaco Caribbean, the Paracas (which has also claimed against and is claimed against by the Texaco Caribbean for the initial collision) and Trinity House. But the death claimants are not before the English courts, the interest of Trinity House with a liability limitation of $80,000 is comparatively minimal, and the fact that the Paracas or its owners are not subject to American jurisdiction is immaterial to the suits here, based on failure of the Texaco interests to mark the wreck of their tanker. As for the overall advantages or obstacles to a fair trial, except for the apparent status of the English law against the appellants here, mentioned below, they appear to be in equipoise.

The public interest factors do not seem to me to support the majority decision, either. The docket of the Southern District is not relied upon. There is no local interest to be served in this international litigation, in England or elsewhere, other than the basic interest of the United States in exercising jurisdiction to avoid a failure of justice. *See Gkiafis* v. *S.S. Yiosonas*, 387 F.2d 460, 464 (4th Cir. 1967); *Heredia* v. *Davies*, 7 F.2d 741, 742 (E.D. Va. 1925), *aff'd*, 12 F.2d 500, 501 (4th Cir. 1926). *See The Belgenland*, 114 U.S. at 367;[5] *Motor Distributors, Ltd.*

[5] Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason

v. *Olaf Pedersen's Rederi A/S*, 239 F.2d 463, 465 (5th Cir.), *cert. denied*, 353 U.S. 938 (1957).

There is, moreover, a very grave danger that appellants will be precluded from recovery under the English law as set forth in *The Utopia*, *supra* and *The Douglas* [1882] 7 P.D. 151, where the House of Lords and Court of Appeals respectively held that mere notice to governmental authorities relieves the owner of a wreck from liability: "This circumstance [report of the collision to the harbor-master] exonerates the defendants from the charge of negligence, for it gave the harbor-master notice to perform the duty." 7 P.D. at 161. Contrast this with *Berwind-White Coal Mining Co.* v. *Pitney*, 187 F.2d 665, 669 (2d Cir. 1951) ("the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark"). *See also Morania Barge No. 140, Inc.* v. *M. & J. Tracy, Inc.*, 312 F.2d 78, 83 (2d Cir. 1962). While the majority's purported distinction of *The Utopia* and *The Douglas* in majority footnote 6 (on the basis that the authorities had assumed complete physical control of the wrecks) is possibly sound, we have no reason to believe that it will necessarily be followed by the English courts, much less any reason to think that English courts will apply some

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why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is preeminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong.

114 U.S. at 368-69.

version of the general maritime law other than its own. *See The Scotland*, 105 U.S. 24, 29-30 (1881). Limitation upon or denial of recovery is in and of itself grounds for *not* dismissing on *forum non conveniens grounds*. Bickel, Forum Non Conveniens in Admiralty, 35 Cornell L.Q. 12 (1949).

In short, the considerations toward which *Gulf Oil Corp.* v. *Gilbert* directs us do not call for dismissal here; justice on the contrary requires that we retain jurisdiction in the American courts where suit was brought. And, if we look at this litigation in the light of the considerations of 1975, not through the cobwebs of the law of half a century or a century ago, what may otherwise be a relatively close case becomes, for me, one that is clear-cut.[6] It is important to world commerce that our courts of admiralty remain open to would-be litigants. The majority decision today shuts them for tenuous and in my view insubstantial reasons.

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[6] This dissent does not have to go into the problem, but I have very serious doubts whether Judge Metzner's seemingly total reliance on Magistrate Jacobs' report recommending dismissal on *forum non conveniens* grounds was itself proper under the Federal Magistrates Act 28 U.S.C. § 636(b) and, *e.g.*, *TPO, Inc.* v. *McMillen*, 460 F.2d 348 (7th Cir. 1972). *See also Wingo* v. *Wedding*, 418 U.S. 461 (1974); *CAB* v. *Carefree Travel, Inc.*, No. 74-2431 (2d Cir. Mar. 7, 1975), slip op. 2169, 2178.

Separate and Concurring Opinion (Mansfield, C.J.)
Entered July 8, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 195 and 205—September Term, 1974.

(Argued April 2, 1975 Decided June 25, 1975.)

Docket Nos. 74-1958
and 74-1468

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of Hagen Pastewka, Deceased and Monica Pastewka, Individually,

Plaintiffs-Appellants,

v.

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees,

AND CONSOLIDATED CASES.

Before:

ANDERSON, MANSFIELD and OAKES,

Circuit Judges.

MANSFIELD, *Circuit Judge* (concurring):

In concurring in Judge Anderson's carefully considered opinion, I do not disagree with that part of Judge Oakes' dissent which suggests that the doctrine of *forum non conveniens* must be administered in a manner that will take into consideration the increased speed of travel, ease

of communication and new types of sea transportation associated with the jet and satellite era in which we now live, as well as changing national and international concepts regarding territorial oceanic claims. Even after making due allowance for these new factors, however, I am satisfied that the principles of *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), should they be modified as urged by the dissent, would still mandate an affirmance in this case.

The accident occurred right off the British coast, where the scene may be viewed with relative ease by the English court. The key witnesses are located in England and cannot be subpoenaed to appear in New York. Texaco, on the other hand, will be subject to the jurisdiction of the English courts and the defendants may in England assert claims over against Paracas and Trinity House, which they could not do in New York. Furthermore, the overwhelming majority of the other witnesses and real parties in interest (German, Dutch and Italian) are located much closer to England than to the United States.

With all major indicators thus pointing to England as the logical forum even in this jet age, the plaintiffs should not be permitted to insist upon our retaining jurisdiction merely because of the possibility that our federal courts might interpret general maritime law more favorably to their cause or award more liberal damages to them than would the High Court of England.

Per Curiam Opinion Striking Error in Majority Opinion, But Deciding Against Rehearing Entered July 25, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 195 and 205—September Term, 1974.

Decided June 25, 1975.

Docket Nos. 74-1958 and 74-1468

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of Hagen Pastewka, Deceased and Monica Pastewka, Individually,

Plaintiffs-Appellants,

v.

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees,

AND CONSOLIDATED CASES.

Before:

ANDERSON, MANSFIELD and OAKES,

Circuit Judges.

PER CURIAM:

By petition for rehearing the appellants have called to our attention an error in footnote 6 of the opinion in that there are included the following clause and citation, "and it could not have properly done so because foreign law is a question of fact which must be proven by expert testimony. See, *Usatorre* v. *The Victoria,* 172 F.2d 434, 438-9 (2 Cir. 1949)." The opinion is therefore modified by striking from the opinion the portion quoted above.

The petition for rehearing is in all other respects denied.

Second Circuit's Order (Clerk) Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 74-1468

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-five.

Present:

HON. ROBERT P. ANDERSON,
HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,

Circuit Judges.

THOMAS I. FITZGERALD,
Public Administrator, *et al.*,

Plaintiff-Appellant,

v.

TEXACO, INC., and TEXACO PANAMA, INC., etc.,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant, Brandenburg

Second Circuit's Order (Clerk) Denying Rehearing

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. Daniel Fusaro,
Clerk

Second Circuit's Order Denying Rehearing In Banc Entered August 6, 1975

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 74-1468

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-five.

THOMAS I. FITZGERALD, Public Administrator, *et al.*,

Plaintiff-Appellant,

v.

TEXACO, INC. and TEXACO PANAMA, INC., etc.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiff-Appellant, Brandenberg [sic] and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Southern District of New York's Memorandum Endorsement Adopting Magistrate's Report Entered March 26, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008 (CMM)

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, ADMINISTRATOR OF THE ESTATE OF HAGEN PASTEWKA, DECEASED and MONICA PASTEWKA, INDIVIDUALLY, *et al.*,

Plaintiffs,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants.

This matter was originally referred to Magistrate Jacobs for hearing and report.

Counsel, as can be seen from the file, have been given every opportunity to argue the question presented to the magistrate before this court. The magistrate previously submitted interim reports on July 25, 1973 and October 26, 1973, which were followed by orders of the court.

The magistrate's final report after submission of extensive briefs by counsel was submitted on January 23, 1974. Voluminous letters to the court commenting on the report were received on January 29, 1974, two on February 4, 1974, and the last on February 7, 1974.

The nineteen-page report of the magistrate reviews in detail the question from all aspects. I have read that re-

Southern District of New York's Memorandum Endorsement Adopting Magistrate's Report

port and all of the papers and I thoroughly agree with his review of the law and his suggestion for the disposition of this motion.

The motion to dismiss on the ground of forum non conveniens is granted on condition that (1) defendants submit to the jurisdiction of the English courts; and (2) waive any defense of the statute of limitations to any claims against them.

So ordered.

Dated: New York, N.Y.
March 26, 1974

CHARLES M. METZNER
U.S.D.J.

Magistrate Jacobs' Report Recommending Dismissal of Plaintiffs' Actions on Certain Terms Entered January 23, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5008

(Judge Metzner)

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, ADMINISTRATOR OF THE ESTATE OF HAGEN PASTEWKA, DECEASED and MONICA PASTEWKA, INDIVIDUALLY, *et al.*,

Plaintiffs,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants.

Defendant's motion dated March 2, 1973 for an order, pursuant to Rules 12 and 56 FRCP, dismissing the actions on the ground of *forum non conveniens,* returnable before Judge Metzner, was referred to the undersigned to hear and report. Before filing any answering papers plaintiffs sought discovery and, as appears from my report dated July 25, 1973 and the order of the Court dated August 6, 1973 and also my report dated October 26, 1973 and the order of the Court dated November 5, 1973, certain discovery by way of interrogatories and the production of documents was allowed to plaintiffs.

Magistrate Jacobs' Report Recommending Dismissal of Plaintiffs' Actions on Certain Terms

The actions arise out of the collision on January 12, 1971 of the German vessel Brandenburg with the wreckage of the Texaco Caribbean in the English Channel following a collision on January 11, 1971 between the Peruvian vessel Paracas and the Texaco Caribbean. The present consolidated actions were brought under the general maritime law to recover damages resulting to the relatives (none of whom reside in the United States) of 12 deceased German seamen of the Brandenburg (for whom the Public Administrator was appointed representative) and damages resulting from the loss of the Brandenburg and her cargo. Plaintiffs state that "the suits are based upon the failure of the defendants to locate, mark or buoy the wreckage of the Texaco Caribbean as required by law" (Aff. Deming 2/7/73 par. 3).

I.

Since the burden rests upon defendants as we shall first set forth a summary of their version of the disaster and the matters likely to arise at the trial. Defendants have offered the affidavits of Robert R. Dimock, sworn to February 6, 1973 (president of Texaco Panama referred to as Texpan); E. F. Pointon, sworn to February 5, 1973 (management director of Texaco Overseas Tank Ship Ltd., referred to as TOT); and John L. Watson, sworn to December 21, 1973 (manager of operations department of TOT) which, briefly stated, set forth the following:

Texpan, a Panamanian corporation, was the sole owner of the Texaco Caribbean, registered under the laws of Panama. The vessel was managed and operated by TOT, incorporated under the laws of Great Britain with offices at London, England. TOT, in the business of shipping management and operation, managed the Texaco Caribbean and

other vessels in the Texpan fleet. It equips and maintains the vessels, appoints agents of the ports, and settles all claims. The master, officers, and crew of the Texaco Caribbean were Italian nationals.

TOT had responsibility for taking all necessary action with respect to the wreckage. It did not have to obtain instructions from Texpan or Texaco.

The British corporation of Trinity House was engaged by TOT to locate and mark the wreck of the Texaco Caribbean and to warn other vessels of the presence of the wreck. TOT is familiar with the steps taken by Trinity House. There are no witnesses on behalf of Texpan who reside in the United States and most, if not all of the witnesses (employees of TOT, surviving crew members of the Texaco Caribbean, employees of Trinity House, crew members of British fishing vessel Accord and Viking Warrier) reside in England and are subject to compulsory process there.

Prior to the sinking of the Brandenburg, crew members aboard the British fishing vessel Accord and Viking Warrier) observed the approach of the Brandenburg and after the sinking picked up survivors and the bodies of deceased seamen from the Brandenburg. According to the affidavit of Pointon, Trinity House, advised of the casualty, dispatched its vessel Siren to the scene which moored at the immediate vicinity and displayed a warning signal of three green lights in a vertical line. Numerous warnings were broadcast by English radio stations. However, the signal was not properly interpreted by the Brandenburg and it thereafter collided and sank (pp. 3, 4).

Defendants state that the following legal actions are pending in England: (1) an action by the cargo owners of the Brandenburg against the Paracas, Texaco Caribbean,

and Trinity House; (2) an action by the Texaco Caribbean against the Paracas; (3) an action by the Paracas against Texaco Caribbean; and (4) an action by the Brandenburg against Trinity House.

Defendants stress that (1) the collision occurred in the English Channel; 2) Trinity House, which was engaged by TOT to locate and mark the wreck and to warn other vessels of its presence, is located in England together with its personnel and records; 3) the crews of the three vessels involved, and the families of the crew members on behalf of whom actions in this Court were brought, are foreign nationals none of whom reside in the United States; (4) if retained in this Court depositions of most of the witnesses would have to be taken; and (5) the absence of certain indispensable parties before this Court, being Trinity House, an English Corporation, and the owner of the Paracas, who are subject to cross claims by defendants.

II.

A summary of plaintiff Brandenburg's position is as follows: There is a heavy burden on defendants since the chosen forum "should rarely be disturbed". The activities of Texpan were directed and controlled out of Texaco's New York office. The necessary witnesses are available to this Court. The suits pending abroad are not significant. To require the action to be brought in England would be to deny justice since in England Brandenburg would have no remedy at all against Texaco Caribbean, the English law being that "when a governmental authority agrees to act in connection with marking a wreck, the ship owner has no further obligation to do so" (Memo p. 7). The applicable law is the general maritime law as applied by the United

States Courts, the collision having occurred on the high seas.

The Public Administrator adopts the arguments of Brandenburg. He also urges that the contingent fee retainer system is illegal in England and would require an advance payment of fees and extensive disbursements by the widows of the deceased seamen in order to enforce their claims (memo p. 16).

III.

In the leading case of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1957) the practical considerations to be considered in determining the application of the doctrine were set forth and include the relative ease of access to sources of proof; the availability of compulsory process and the expense of obtaining the attendance of witnesses; a possible view of the premises; all practical matters that make a trial easy, inexpensive and expeditious; factors of public interest including administrative difficulties in congested centers of litigation; local interest in having localized controversies decided at home; advisability of deciding cases in the forum where they arise and whose law will be applied; and plaintiffs' choice of forum.

There are differences between the parties as to occurrences and the significance of the testimony of various persons. In order to put the matter in focus we shall set forth and discuss the likely proof to be offered, the conflicting views of the parties, and some comment.

1) *Location and Availability of Witnesses and Records:*

a) Defendants stress that TOT had the necessary authority, without reference to New York or anywhere else,

to take necessary steps to engage the services of any one who might be required and that authority was exercised when it engaged the services of Trinity House and the vesel Siren to locate, mark and buoy the wreckage and also when TOT later, on January 13, 1971, engaged the Queen Mother for salvage operations (Aff. Stern 1/8/74 p. 5). The testimony of the employees of TOT and its records would seem most important. Such personnel and records are in or near England. Defendants assert that TOT personnel were immediately dispatched to the scene of the casualty and were present in Dover on January 11, 1973 (Aff. Stern p. 7).

b) Defendants stress that the testimony from the crew members of the Trinity vessel Siren, as well as other employees of Trinity, all of whom are in England, is of vital importance to show what steps were taken (after the Paracas collision) to locate and mark the wreck; the traffic in the area; the approach and subsequent collision of the Brandenburg; and whether other vessels observed and obeyed their signals. Plaintiffs do not question the importance of this testimony but state that it can be taken by deposition.

c) Defendants stress that the testimony of those on board the various fishing boats in the area, who are in England, is important not only in the issue of liability but also as to any damages (conscious pain and suffering). Plaintiffs question the importance of this testimony stating that they did not witness the sinking of the Brandenburg (Memo p. 18).

d) Defendants stress the importance of the testimony of the surviving members of the Texaco Caribbean (Italian nationals) having knowledge of the original Paracas-

Texaco Caribbean collision—and also the surviving crew members of the Brandenburg who reside in Germany. Plaintiffs contend that any such testimony is irrelevant or of little significance since the cause of action is based upon the failure to locate and mark the wreck (Brief p. 18).

e) Plaintiffs state that before the sinking of the Texaco Caribbean the firm of Smit-Tak/Rotterdam, a salvage company, offered to TOT the services of a searching and salvage vessel "Orca" and that Smit-Tak "understood that the reason for non acceptance was that it could not be accepted without authority from the Texaco Caribbean interests in New York" (Aff. Deming 12/14/73 p. 3). As particularly set forth in their papers (Deming Aff. December 10, 1973, pages 2 et seq.; Hummel Aff. May 16, 1973 (member of Claims/Insurance Department of Hapag-Lloyd); and letter from Brandenburg counsel dated January 14, 1974), plaintiffs claim that the sequence of events was as follows. The collision with the Paracas took place at 0400 on January 11. At 10:30 am on January 11 Smits offered the services of its salvage vessel Orca but the offer was not accepted. The stern section of the Texaco Caribbean was afloat until 2:00 pm January 11. After the sinking of the Texaco Caribbean Smit renewed its inquiries. At 4:30 pm on January 11 the Siren arrived in the area. At 0730 on January 12, 21 hours after the Smit offer, the Brandenburg struck the stern of the Caribbean. After the sinking the Brandenburg employed Smith and the Orca located the wreck within half an hour of its arrival.

Defendants question this "hearsay testimony" and state that the first communication between Smit-Tak and TOT took place on January 13, not January 11, which was after

the sinking of the Brandenburg, and related to salvage operations and not any attempt to locate, mark or buoy the wreck of the Caribbean (Aff. Stern 1/8/74 p. 4). Defendants also stress that Smit is a Holland organization and its personnel are Dutch; and that if this matter needed clarification the testimony of Watson (TOT) and Mitchell (Smit), in addition to other personnel at TOT's and Smit's, would be necessary, and that all these witnesses are located in or near England (Aff. Stern p. 5).

f) Plaintiffs also assert that after the collision with the Paracas the United States freighter "Leslie Lykes" (an American vessel with an American crew) arrived in the vicinity and that the members of the Leslie Lykes were important witnesses to the opportunities to mark, the wreck while it was still only partially submerged; that its home port is Florida; that it trades regularly to United States ports (Aff. Deming p. 3). Defendants assert that the vessel trades between the Gulf ports and the Far East; and the New York Maritime Exchange indicates that the first and only time it has ever come to New York was in April 1966 (Aff. Stern p. 6).

g) Inquests were held in England as to the deceased crew members but plaintiffs assert that these inquests did not involve any inquiry into the cause of the accidents.

h) Plaintiffs assert that the central control of policy matters was had in New York relying upon the letter sent by Texpan in December 1967 stating, among other things, that "payment of hire and matters pertaining to charter party terms will be continuing to be handled by Texaco Panama in New York" (Aff. Deming p. 5). Defendants

contend that TOT had the necessary authority to take all necessary steps and in fact exercised it (Aff. Stern p. 4).

i) While defendants have stated that this Court would not have the power to compel the attendance of any of the material witnesses (Aff. Stern February 28, 1973, p. 8) plaintiffs assert that under English Practice Rules compulsory process is available and the United States Court could apply to the English court for someone to be appointed as examiner (Aff. Deming p. 11)

2) *Pending Law Suits in England:*

These proceedings have already been set forth. Plaintiffs contend that the action by some of the cargo owners is the only English suit which has proceeded beyond filing; that the suits by Texaco Caribbean against Paracas and by Paracas against Texaco Caribbean, are irrelevant to the present action; and that the action by Brandenburg against Trinity was commenced solely to avoid time bar (Aff. Deming p. 9).

3) *Claims Over Against Paracas and Trinity:*

Defendants strongly urge that they have serious claims against Paracas and Trinity; that Paracas began the chain of events which led to the Brandenburg collision one day after the Texaco Caribbean sank; and that Trinity was on the scene at the time of the Brandenburg collision and was responsible for locating and marking the wreck. It is urged that they are indispensable parties who may not only be ultimately liable but whose testimony is essential (Aff. Stern p. 9). Plaintiffs urge that any claims by defendants against Paracas are irrelevant to the present suit which

is based upon the failure to locate and mark the wreck; and the position of Trinity is of "small quantitative importance" since it could limit its liability for any negligence to $80,000 (Memo p. 22).

4) *Applicable Law:*

While defendants contend that the rights of all parties will be governed by foreign law (Brief March 2, 1973, p. 22) plaintiffs urge that as the collision was on the high seas (12 miles from the English Coast, England like the United States having a 3 mile limit) the applicable law is the general maritime law as applied by United States Courts (Brandenburg Brief p. 12).

5) *English Law Compared with United States Law:*

a) Plaintiffs urge that in England there would be no remedy since under the English cases there is a rule "which would probably operate to relieve Texaco Caribbean from liability for its faults and failures, merely on the basis of Texaco Caribbean's invitation to governmental authority to take action to locate and mark" (Citing *The Utopia,* House of Lords (1893) 18 A.C. 492 and *The Douglas,* Court of Appeals (1882) 7 Probate Division 151).

Utopia presented the following situation. The Utopia collided with the Anson on March 17 and its hull was submerged. The owner lighted the wreck but on March 23 the captain of the port ordered a hulk in the vicinity and a hulk was anchored. A collision with the Primula took place on March 31. The lower Court found that the position of the wreck was not sufficiently indicated by the employees of the port. The House of Lords held that the owner was not

liable. It stated that in order to hold the owner liable "two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them—and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect" (p. 498). The Court recognized that while the Utopia was not abandoned "in the sense that they gave up all rights of property and possession" "control and management of the wreck, so far as related to the protection of other vessels from her, and her from them, was properly transferred to the port authority" and no default or negligence could be imputed to the Utopia "in allowing the port authority to take on itself the control of the lighting or in abstaining from interfering with the subsequent action of the port authority in the matter".

While the case recognizes that there is no liability on the owner for the default as such of the governmental authority it also recognizes that the owner is liable where there has been "misconduct or neglect" on its part apart from the conduct of the authority". It should be noted that in the present situation plaintiffs do charge a failure on the part of defendants themselves to call upon Smit to locate and mark the wreck.

b) On the other hand, plaintiffs urge that under United States law there is a non-delegable duty on the part of the owner and that the owner is not necessarily relieved by turning over the matter to a governmental authority.

In *Berwind* v. *White Coal Mining Co.* v. *Pitney,* 187 F.2d (2 Cir. 1951) the Coast Guard was called in after a series of accidents and in holding the owner liable the Court, after referring to the "wreck statute", 33 U.S.C. 409

(which applies only to navigable waters in the United States and makes it the duty of "the owner of such sunken craft" to mark it immediately and provides that "the neglect of failure" of the owner "shall be unlawful") said "It is a matter of public policy reflected in the statute to place the responsibility for marking the wreck squarely upon the owner alone. The appellant, who was the owner did nothing in that regard although as early as two hours before the first accident at the wreck the general foreman had noticed the barge had sunk in navigable waters" (p. 669). The Court further said

> Nor do the unsuccessful efforts of the Coast Guard to locate and mark the wreck affect this liability. It has long been the law that an owner may comply with the statutory requirement for marking by getting the Lighthouse Department (Now the Coast Guard) to do it; when the Coast Guard does mark the wreck, whether properly or not, the owner is relieved of any statutory duty in that respect. The Plymouth, 2 Cir. 225 F. 483, certiorari denied, 241 U.S. 675, 36 S.Ct. 725, 60 L.Ed. 1232; New York Maritime Co. v. Mulligan, 2 Cir., 31 F.2d 532; City of Taunton-Sunken Wreck, D.C.S.D.N.Y., 11 F.2d 285, 1927 A.M.C. 135; The Barge Chambers, D.C.S.D.NY., 98 F 194, 1924 A.M.C. 572; Wilson v. Mitsui & Co., D.C.N.D. Cal. 27 F.2d 185. The basis of this exception to the otherwise non-delegable duty is the fact that the private owner cannot interfere with the manner in which the government agency uses its discretion in the manner of marking. The Plymouth, supra. Although the Coast Guard's search for the wreck may, if made with due

> diligence in the light of the facts within the knowledge of the owner, operate to discharge the owner's duty, the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark. The Snug Harbor, 4 Cir. 40 F.2d 27. The dicta in Petition of Anthony O'Boyle, Inc., 2 Cir. 161 F.2d 966, 967, and Red Star Towing & Transportation Co. v. Woodburn, 2 Cir., 18 F.2d 77, 79, which may indicate the contrary should be discounted accordingly." p. 669).

Berwind appears to recognize that if there is a marking by the Coast Guard, "whether properly or not", there is no further liability. In this connection it is to be noted that defendants assert that the vessel Siren moored at immediate vicinity and displayed a warning which was not properly interpreted (Aff. Pointon, p. 4). Accepting the factual version of the defendants it may be argued that there was a "marking" by the Siren and that under the claimed facts there would be no difference between the English law and the United States law.

Thus, it is not clear that under plaintiffs' theory of liability or defendants' version of the sinking of the Brandenburg there is a difference between the English law and the United States law. It is also noted that plaintiffs stress that there was a failure to employ Smit-Tak to locate and mark the wreck and if this had been undertaken and accomplished the later Brandenburg wreck may not have occurred.

c) Moreover, assuming that the English law is less favorable in certain respect to the claimants than the United States law what is the significance of this in de-

termining whether this Court should retain jurisdiction? Plaintiffs contend that "where the foreign law is so unfavorable that the granting of the motion might result in depriving the plaintiff of all remedy, this fact is a very powerful reason for retaining jurisdiction in the United States Court" (Brandenburg memo p. 8), citing the decision of Judge Bryan in *Chemical Carriers* v. *L. Smit & Co.'s Internationale,* 154 F. Supp. 886 (S.D.N.Y. 1957).

In Chemical the libelant in an admiralty action was a Liberian corporation controlled by American citizens with its principal offices and place of business in New York. Libelant had a towage contract for the towage of libelant's vessel from Philadelphia to Rotterdam but the tugs assigned to the contract were in fact used to salvage a German vessel. The suit was in the alternative for damages for breach of the towage contract or a share in the salvage earned by respondent. A clause in the towage contract provided that all disputes should be submitted to the Netherland Courts. This Court retained jurisdiction stating that the provision vesting exclusive jurisdiction in the Netherland Courts was "unreasonable in its effect for several reasons" (888). The Court stated that apparently there could not be any remedy under Netherlands law and such a result "would not be in accord with the theory of salvage in this country" (p. 89). However, the Court also stressed that there was another action pending in this Court against the German vessel which was salvaged; again, that "any questions of convenience of witnesses and litigants would appear to be weighted in favor of the libelant"; and finally, that libelant was "essentially an American enterprise" (p. 889). Whether the principle urged by plaintiffs—that jurisdiction should be retained in view of the claimed less

favorable English law—should be applied in the present situation where all of the claimants are foreign residents or nationals present a doubtful question.

As already stated, plaintiffs contend that "the contingent fee retainer system is illegal in England and would require an advance payment of fees and disbursements by the widows of the deceased seamen" and that "such an intolerable burden would act to extinguish the causes of action" (memo p. 16). Defendants urge that such an argument is irrelevant and has no place in the action. Furthermore, they contend that not only are legal fees and costs recoverable in England by a successful party but English counsel have advised them that under present English law a matter can be handled on a contingency fee basis when it has been referred to English counsel by American counsel who themselves are engaged on a contingency fee basis (Aff. Stern, p. 12).

IV.

The following decisions in this Court are instructive. *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d 499, 501 (2 Cir. 1966); *Noto* v. *Cia Secula de Armanento*, 310 F. Supp. 639 (S.D.N.Y. 1970 Judge Weinfeld); and *Domingo* v. *States Marine Lines*, 340 F. Supp. 811 (S.D.N.Y. 1972 Judge Bryan).

In Fitzgerald a vessel ran aground in the Aleutian Islands, broke up, and sank. An action was brought on behalf of 31 Spanish nations and one Yugoslavian who perished. The claims were against the owner, a New York Corporation, charging negligence and unseaworthiness; a Japanese corporation and a Canadian corporation charging negligence in converting the ship from a tanker to a bulk

carrier and in loading the vessel. In upholding the decision of the District Court dismissing the action against the Japanese and Canadian corporations the Court of Appeals stated that "unless the balance is strongly in favor of the defendant, plaintiff's choice of forum should rarely be disturbed" but the "doctrine leaves much to the discretion of the Courts to which plaintiff resorts" (p. 501). The following "compelling reasons" for dismissal were set forth. "Nearly all the witnesses" whose testimony relates to the claim of negligent conversion are in Japan. No process to compel their testimony in New York is available and there would be great cost in bringing them to New York. New York has "little connection with the accident which occurred off the coast of Alaska". The District Court would have to interpret the foreign law and all of the deceased crew men are foreigners. In the light of all these factors the Court concluded that "the balance is strongly in favor of defendants" and the District Court did not abuse its discretion (p. 502).

In Noto an Italian owned tanker exploded and sank in Iran. Thirty-one of the crew perished, and the actions were on behalf of the deceased crew members and their survivors. All of the plaintiffs were residents of Italy. The action was based on a maritime tort. At the time of the disaster the tanker was under charter to the subsidiary of an English corporation. The oil being loaded aboard the vessel had been acquired by an Iranian corporation which had sold it and passed title thereto to an English corporation. The defendants bringing on the motion were major American oil companies. The Court stated that it was to exercise its discretion "upon a realistic appraisal of facts" (648). It stressed that the disaster occurred in

Iran; the ship was of Italian registry and ownership; plaintiffs were Italian nationals as were the crew members; the time charter of the vessel and the owner of the oil were not before the Court; the witnesses and records were all in Iran or Italy; if the case were retained it would be necessary to resolve complex issues of foreign law (648). The Court further stated that "plaintiffs' asserted claims have no relationship to or contact with any jurisdiction in the United States" (649).

In Domingo there was a collision between the Golden State and the Pioneer Leyte in Manila Harbor, Philippines, The Golden State was owned and operated by States Marine, a Delaware corporation, and the Pioneer Leyte, a Philippine corporation. There was a loss of 100 lives, all being citizens or residents of the Philippines, and the actions were by the next of kin or representatives of 99 decedents. There were also actions in other jurisdictions including Delaware and the Philippines. The following factors were relied upon in dismissing the action. "There is a legal interest in having localized controversies decided at home". All the events took place in the Philippines and plaintiffs source of proof are almost entirely there. The "vast majority of witnesses, both willing and unwilling, are in the Philippines" and the cost of obtaining willing witnesses would be minimal there as compared with here. Compulsory process in the Philippines would be available. It would be inconvenient to bring witnesses to the United States. Dismissal was granted even though the Court in Delaware had denied a similar motion to dismiss (p. 816). The motion was granted upon the express conditions that defendants (1) submit to the jurisdiction of the Philippine Courts in any action which might be commenced and (2)

waive the statute of limitations as a defense in any such actions.

V.

While the parties have expressed differences on many matters which may go to the merits of the action, certain matters, many of which are obvious, stand out in bold relief. The disaster took place 12 miles off the English coast even though not strictly in England but in international waters. None of the beneficial claimants, nor any of the surviving members of the crews of any of the vessels, reside in the United States. The employees and personnel of TOT, whose testimony will be vital, as well as the records, are in or near England. The employees and personnel of Trinity, whose testimony will be vital, as well as its records, are in England. While all of these persons, and other persons, may be subject to compulsory process so as to take their deposition the deposition of witnesses is obviously a poor substitute for live testimony.

While plaintiffs have referred to the testimony of Smit-Tak as important their personnel are located in Holland. The contention that the conduct of defendants after the wreck was directed from New York has been sharply attacked by defendants; in any event the action viewed as a whole seems to have little if any contact with New York and whatever contact it may possibly have is strongly outweighed by all the other circumstances.

It is not clear that under plaintiffs' theory of liability or defendants' version of the sinking of the Brandenburg (after some marking of the wreck by the Siren) there is any essential difference between the English or United States law. And even if English law were less favorable in

certain respects, it is believed that this is not a controlling factor under all the circumstances including the scene of the distaster and the foreign nationality of all the beneficial claimants.

In my view after weighing all the factors, there are most compelling reasons for dismissing the action and "the balance is strongly in favor of defendants".

Accordingly, it is recommended that the motion of defendants to dismiss on the ground of *forum non conveniens* be granted upon the express conditions that (1) defendants submit to the jurisdiction of the English Courts and (2) waive any defense of the Statute of Limitations as to any claims against them.

Dated: New York, New York
January 23, 1974

Respectfully submitted,

MARTIN D. JACOBS
United States Magistrate

Copies of this report have been mailed to counsel.